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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

CARMINE PERSICO, JR., SALVATORE ALBANESE and RALPH SPERO,

Petitioners,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

ON JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' JOINT REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The following items of reply are not necessarily in the order of their importance; they are in the order in which the respective items appear in the Brief in Opposition.

I.

At Br. Opp. 6 the Government oversimplifies the record facts as to the Trial Court's examination of the jurors on the Joseph Valachi publicity. This oversimplification is in the Government's sentence reading (p. 6):

> "The trial court closely examined each juror separately and each—except one who was later excused—assured the court that he could decide the case fairly based on the evidence introduced in the case (T.2296-2407)."

The Court will please contrast with the above statement of the Government, our more complete (and more meaningful) recitals on this same subject at p. 26 (first full paragraph) of our Joint Petition herein.

II.

At Br. Opp. 8, fn. 6, the Government takes up our claim that news reporters were aware of Valachi's presence before the Government told defense counsel (see Joint Pet. Cert. herein, pp. 19, 24). *First*, the Government invokes the statement in the opinion below that this claim of ours was "tenuous" (Br. Opp., p. 8, fn. 6).* It is hard to see how the facts presented in the quotation from the record on p. 24 of our joint petition herein could be justly disparaged as "tenuous". *Second*, the Government is silent concerning our recitals on p. 19 (last paragraph) of the Joint Petition about the Government's failure to keep its promise that it would investigate and report back to the Trial Court as to how the Valachi sensation had so manifestly leaked to the press before defense counsel were informed. Supplementing our recitals and quotations at pp. 19 and 24 of the Joint Petition, may we now call attention to the fact that the trial prosecutor's promised "investigation to find out" how this leak occurred was promised by him in direct response to an *unchallenged* statement by one of the defense counsel (Mr. Lewis), at Tr. 3577-3578:

> "Mr. Lewis: Your Honor, may I ask one question? I hope Mr. Woerheide will answer it.

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* The opinion below did use the word "tenuous" but the Brief in Opposition sees fit to intimate—quite incorrectly—that the Court below deemed this matter "most" "tenuous", rather than only "tenuous".

> Mr. Valachi's presence was announced sometime during the afternoon. How is it for the first time that three defendants, including my defendant, had their picture taken during the lunch hour? How is it that this place was loaded with reporters before the announcement was made that Valachi was here? What about security provisions then?
>
> Will you explain that to the Court? Did these reporters have a crystal ball to know that you were going to call Valachi? We didn't know it.
>
> Mr. Woerheide: Your Honor, we are making an investigation to find out."

How can it be said, then—in view of the above quotation from the record plus the record items cited and quoted at pp. 19 and 24 of our joint petition—that, again, our claim of the reporters' knowing about Valachi before defense counsel were informed is "tenuous"? In view of Mr. Woerheide's apparent acknowledgment in the above quoted colloquy that some kind of advance alert of the press had actually occurred and was something that needed to be explained or investigated, how can the Government now argue as it does in the Brief in Opposition (p. 8, fn. 6) that this advance alert of the reporters had not even taken place at all. Since the Government's own trial prosecutor apparently recognized that such an advance alert of the press had taken place, it is wrong for the Government now before this Court to try to disown that acknowledgment of its own trial prosecutor. *Third,* the Brief In Opposition goes on to suggest (p. 8, fn. 6) that defense counsel themselves, and not the prosecution, caused the net harm to the defense from the Valachi publicity, because defense counsel pressed the issue in open court "With a plenitude of reporters present". This is extremely unfair argument by the Government, for it was this very presence of "a plenitude of reporters"

at the trial juncture in question which Mr. Woerheide himself acknowledged (*supra*) indicated an advance alert to the reporters and called for investigation.

III.

At Br. Opp. 8, fn. 6 (second paragraph) the Government answers our contention (Joint Pet. Cert., pp. 4, 17-19, 32) that the Government improperly led the Trial Judge to believe that the then United States Attorney had lent his local official authority to the secret summoning of Valachi. The Government is incorrect in its statement (Br. Opp. 8, fn. 6, second paragraph) that "The body of the affidavit made no such representation but indicated quite the contrary (S. T. 186)". In this very affidavit, which bore the typewritten initials "JPH"—the initials of Joseph P. Hoey, the then United States Attorney—the Government, contrary to its present contention, did not exclude from its representations to the Trial Judge that the United States Attorney was privy to this secret step or that the natural inference from the use of his initials should not be drawn. Instead, the Government represented only that "*personnel* of the United States Attorney's Office" had not been informed.*

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* The record references for the text of this affidavit appear at pp. 17-18 of our Joint Petition. The pertinent portion of the text of the affidavit appears also in the transcript dated September 20, 1968, p. 186. The relevant text portion of the affidavit reads (item numbered 62 in the Record on Appeal):

> ". . . To this juncture, only a few officials of the Criminal Division, Department of Justice, the Bureau of Prisons, the Federal Bureau of Investigation, Marshall George Ward and Chief Deputy Marshall Joseph Denson are informed of the plan to produce this witness. Precautions have been taken to inform no other person, including personnel of the United States Attorney's office and the office of the Clerk of the Court."

With the United States Attorney's own initials appearing on the affidavit, the words "*personnel* of the United States Attorney's office" would naturally be taken by any intelligent reader as being intended to convey that the United States Attorney himself knew what was happening but that his office "personnel" did not know. On p. 19 of our Joint Petition herein we quote the record items where the prosecution did *later* unambiguously represent to the Trial Court that the United States Attorney had not been informed. There was no such unambiguous representation in the affidavit, and it is wrong for the Government now to try to convince this Court to the contrary.

IV.

At Br. Opp. 11-13 the Government answers our contention that certiorari is needed to redress the over-all opressive impact of the five-trials history of this case as culminated in the fifth trial convictions here sought to be reviewed. Nothing in the Government's presentation on this subject touches the crucial aspect of the final cumulative impact of the fifth trial itself. For example, nothing in the history of the prior proceedings as summarized by the Government at Br. Opp. 11-12—including the 1969 Mandamus proceedings—reaches this ultimate problem of the aggrieving effects or of the due process merits of the fifth trial itself in its relation to the entire five-trials history. In other words, now is the first time that this Court has been called upon to examine this latter inclusive question of ultimate due process in this case. In our Reason no. 6 in the Joint Petition herein (p. 34), we pointed out this decisional posture of the case thus far on the over-all five-trials issue; we there

referred to pp. A33-A38 of the Appendix to our Joint Petition. The latter portion of that Appendix consists of a part of our Joint Petition for Rehearing and Rehearing En Banc in the Court below. For convenience, we now quote from A37-A38 of said Appendix to the Joint Petition, where the thus far incomplete decisional posture above referred to is particularly described:

> "We urge that, to this moment, there has not been an adequate, indeed there has not been *any* appellate adjudication, by this Court, of the *overall, combined, cumulative* impact of the history of the five trials, taken all together, on the constitutional rights of the appellants. The mandamus decision of this Court dealt solely with Judge Dooling's evaluation of these constitutional issues as confined within the framework of the narrowly limited 'speedy trial' issues which the mandamus Bench deemed were the only issues left open by Judge Weinstein to be decided by Judge Dooling.* Then, in the recent decision of this Court dated April 15, 1970, only two points (insofar as pertinent to the five-trials issue) were decided by this Court, namely, (1) that Judge Weinstein had ruled correctly on the points presented to him (but, we repeat, *those points all factually pre-dated all of the happenings in the fifth trial,* before Judge Dooling), and (2) that Judge Dooling had not erred in declining to set aside the jury verdict on the basis of the happenings in the fifth trial as such (which, *we note, wholly left out of account the inter-relationship between the fifth trial happenings and the happenings over the entire course of the prior four trials*).

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* "To this moment we respectfully fail to understand how this Court in the mandamus case could read Judge Weinstein's plenary order in this narrowed way."

Thus, it respectfully seems to us that, in all of the presently governing decisions affecting this matter—this Court's decision of April 15, 1970 on the merits of the appeal from the judgment of conviction, this Court's 1969 mandamus decision, Judge Dooling's several adjudications, and Judge Weinstein's pre-fifth trial determination as to overall constitutional aggrievement—there still abides an entirely *undecided*, by this Court, element of this case, a constitutionally indispensable element that must and has not been decided, namely, whether, tested by overall due process and by overall double jeopardy and by over-all cruel punishment considerations, the entirety of these prosecutive proceedings, from the first *through* the fifth trial has satisfied the constitutional tests just mentioned.

If we are correct in our suggestion of this glaring decisional gap in the present appellate posture of this case before this Court, it does respectfully seem to us that rehearing is indicated."

V.

At Br. Opp. 12, fn. 9, the Government answers our argument based on *United States* v. *Sisson*, 399 U.S. 267 (Joint Pet. Cert. herein, pp. 35-37). *First*, the Government relies on the fact that Judge Dooling's proposed order of dismissal was never actually entered by him. The order was never entered by Judge Dooling, however, because he was mandamused (*United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2 1969), cert. denied 395 U.S. 911—printed as Appendix G to our Joint Petition herein). Our Joint Petition herein urges that (pp. 35-37), on the over-all record as it now stands, this Court should now remand the case to Judge Dooling for a "*Sisson*" disposition in his discretion.

Second, we now respectfully further pray that, if deemed necessary to a correct disposition of the within certiorari petitions, the Court should grant rehearing, out of time, of its denial of certiorari in the mandamus case (395 U.S. 911); cf. *United States* v. *Ohio Power Co.*, 353 U.S. 98; *Gondeck* v. *Pan American World Airways*, 370 U.S. 918, 371 U.S. 856, 382 U.S. 25; *Stern & Gressman, Supreme Court Practice*, Fourth Edition, pp. 515-520. We do not know whether this Court has power, or would in this case exercise that power, to grant such a late-filed petition for rehearing *sua sponte*, i.e. without first receiving a formal motion for leave to file such a petition for rehearing. We are therefore also filing a separate motion for leave to file a petition for rehearing in the mandamus case, *Persico* v. *United States*, 395 U.S. 911, October Term 1968, No. 1187.

Third, the Government argues, against our *Sisson* point, that Judge Dooling's proposed order "would not have relied upon the insufficiency of the evidence, but rather on other factors" (Br. Opp. 12, fn. 9). Judge Dooling's proposed order is printed in the appendix to our Joint Petition herein at A44-A59. At p. 37 of our Joint Petition (first paragraph) we suggest just how *Sisson* applies here, including the resemblance of our situation to *Sisson* in regard to the Trial Judge's re-examination of the trial evidence. We there call attention especially to Judge Dooling's expressions of dissatisfaction concerning the testimony of the witness Gehring. Gehring was important for the Government's case on the literally win-or-lose *evidence-sufficiency* issue of whether the hijacked truck had been located on the Union Street or the Nevins Street side of the Akers Terminal during the alleged pre-hijack "spotting" activities of the accomplice witness Vaccaro (Joint Pet. Cert. herein,

pp. 4-5, 8-10, 12-14, 37). In his proposed Order and Opinion Judge Dooling said, "There is more than a disturbing doubt, too that Gehring's possibly very important testimony about the location of the 'straight job' on the critical morning was not fairly presented" (A-56 in appendix to Joint Petition herein); and further, "Gehring's failure of recollection between 1964 and 1968 impaired counsel's opportunity to cross-examine him in the most effective manner. The trial related to an episode that had occurred nearly nine years earlier. After four trials within the three year period May 1961 to April 1964, the fifth trial was not commenced until over four years after the last preceding trial commenced. Testimony, in such a setting is arguably a feat in recalling earlier testimony rather than the facts; consistency not truth arguably becomes the testimonial goal" *(id.,* A57-A58). Gehring's testimony being thus undeniably important for the Government's case on the issue of sufficiency of the evidence, and Judge Dooling having thus so gravely questioned the probative quality of Gehring's testimony, how can the Government now justifiably argue that Judge Dooling's "proposed order would not have relied upon the insufficiency of the evidence" (Br. Opp. 12, fn. 9). *A fortiori,* when one considers the exhaustively detailed way in which the Court analyzed the Trial Judge's approach to the evidentiary problems in *Sisson*, does one not come away with the strongest possible impression that *Sisson* favors a maximum of detailed judicial care in reviewing such *Sisson* type trial records on appeal, rather than the minimum or conclusory

standard suggested by the Government's argument herein on this *Sisson* point of ours.

CONCLUSION

It is respectfully submitted that the joint petition for certiorari should be granted.

Respectfully submitted,

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* Incidentally, at Br. Opp. 13, fn.10, the Government says that our claim of insufficiency of the evidence was "raised for the first time in the petition for Rehearing *En Banc* in the court below. Our petition for rehearing in the Court below was not merely for rehearing "*en banc*", but "for rehearing and rehearing en banc". That is, we do not want this Court to think that we neglected to raise the question of sufficiency of the evidence in the Court below until the last-ditch stage of a petition for rehearing *en banc*. This issue was fully preserved at the stage of petition for rehearing before the Panel of the Court below. See the appendix to the Joint Petition for Certiorari herein, pp. A24-43.